

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington D.C. 20554

RECEIVED

SEP 25 1995

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Amendment of Parts 21 and 74)
of the Commission's Rules With)
Regard to Filing Procedures in the)
Multipoint Distribution Service)
and in the Instructional)
Television Fixed Service)

MM Docket No. 94-131

DOCKET FILE COPY ORIGINAL

and)

Implementation of Section 309(j))
of the Communications Act -)
Competitive Bidding)
(The BTA Decision))

PP Docket No. 93-253

In the Matter of Amendment of)
Parts 21, 43, 74, 78 and 94)
of the Commission's Rules)
Governing Use of the Frequencies)
in the 2.1 and 2.5 GHz Bands)
Affecting: Private Operational)
Fixed Microwave Service,)
Multipoint Distribution Service,)
Multichannel Multipoint)
Distribution Service,)
Instructional Television Fixed)
Service, and Cable Television)
Relay Service)
(The PSA Decision))

Gen. Docket No. 90-54

Gen. Docket No. 80-113

To: The Commission

CONSOLIDATED REPLY TO OPPOSITIONS TO AND
COMMENTS ON PETITIONS FOR RECONSIDERATION

The law firm of Schwartz, Woods and Miller, on behalf of the following ITFS clients and pursuant to Section 1.429(g) of the Commission's rules, files this Consolidated Reply to the Oppositions to and Comments on the Petitions for Reconsideration filed in the above-captioned BTA and PSA proceedings:

Arizona State University
Board of Trustees of Community Technical Colleges
Boston Catholic Television Center
California State University-Fullerton
Catholic Diocese of Youngstown
Connecticut Public Broadcasting, Inc.
Daytona Beach Community College

Detroit Educational Television Foundation
Fifteen Telecommunications, Inc.
Mid-South Public Communications Foundation
Mississippi Authority for Educational Television
Mississippi EdNet Institute, Inc.
Monterey County Office of Education
New Jersey Public Broadcasting Authority
North Carolina Agricultural and Technical State University
North Carolina State University
Northern California Educational Television Association
Oregon Public Broadcasting
San Jose State University
Santa Clara County Office of Education
University of North Carolina at Charlotte
University of North Carolina Center for Public Television
University of North Carolina General Administration
WHYY, Inc.
Winston-Salem State University
WJCT, Inc.

(hereinafter "Joint Parties"). In support thereof, the following is shown:

1. BTA Holder Right of First Refusal. In its Petition for Reconsideration, filed on August 15, 1995, the Joint Parties strenuously opposed the Commission's provision granting BTA holders a right of first refusal on all BTA-area agreements by ITFS licensees to lease excess capacity to MMDS wireless cable operators. As noted in the Opposition pleadings, there was virtually universal endorsement of the Joint Parties' position. In accordance with this strong sentiment by ITFS and MMDS parties alike, and the persuasive documentation in the Petitions for Reconsideration and the Opposition pleadings regarding the fundamental deficiencies in this proposed BTA holder's right, the Commission should repeal its ill-conceived proposal.

2. Proposals for Blanket Authorizations for BTA Holder. The Joint Parties have carefully reviewed the proposals for blanket authorizations for BTA holders. However, they are in agreement with various Opposition filings (e.g., The Wireless

Cable Association International, Inc. ("WCAI"), Opposition, pp. 8-10; Instructional Telecommunications Foundation ("ITF"), Opposition, pp. 1-4) that such blanket authorizations should not be condoned. As WCAI properly concludes (Opposition, p. 8), these proposals afford "an unacceptable risk of harmful interference to subscribers to existing wireless cable systems and to ITFS receive sites."

3. The Adequacy of Protections to ITFS Interests by BTA Holders Regarding New and Modified Proposals. The Petitions for Reconsideration filed by numerous ITFS parties raised serious questions concerning the proper degree of protection to be afforded to new or modified ITFS facilities following the awards of grants to BTA holders. See, e.g., ITF Petition, pp. 3-6; Area Commission of Greenville Technical College ("Area") Petition, pp. 6-8; Network for Instructional TV, Inc. ("NITV") Petition, pp. 4-6; National ITFS Association ("NIA") Petition, p. 4. As succinctly stated by Area (Petition, p. 7):

the apparently unintended effect of the new rules would be that any application for a new ITFS station or a modified ITFS station (which modifications increase signal strength in any direction, change polarization or make any other change implicating interference issues) on the D and G ITFS groups, and in some cases on any ITFS group, will, as a result of inevitable predicted co- or adjacent channel interference within areas in the BTA, only be able to proceed with the consent of the BTA licensee. Such consent would be necessary even if the ITFS application proposes facilities that would not interfere with the receive sites or protected service areas of any licensed or previously proposed ITFS or MMDS stations.

4. The Joint Parties have reviewed the proposals by WCAI, both in its Petition and in its Partial Opposition, which have sought to ameliorate these proposals insofar as ITFS interests are concerned. For instance, WCAI (together with others) has

correctly urged consistent MMDS and ITFS interference protection rules and clarification of the interference protection obligations owed incumbents, which should and must include ITFS facilities. In its Partial Opposition, WCAI, while recognizing that its compromise proposal does not fully address ITFS concerns "regarding potential domination of the ITFS spectrum by BTA authorization holders" (Partial Opposition, p. 12), nonetheless proposes that

any ITFS stations authorized or proposed prior to the BTA auction should be permitted to make modifications so long as the PFD [power flux density] at the boundary of that station's PSA does not exceed -73 dBw/m . . . WCAI believes the right to make ITFS modifications under its proposal should be limited to those facilities authorized or proposed as of the close of the upcoming ITFS filing window on October 20, 1995.

The Joint Parties welcome these proposals by WCAI, which head in the right direction of proper protection of ITFS interests within ITFS spectrum space.

5. However, in the view of the Joint Parties, these proposals do not go far enough. As aptly observed by ITF in its Opposition, p. 4, the Commission should insure that ITFS entities remain able at all times to gain access to new ITFS facilities and that they retain the right to modify existing authorized facilities, consistent with protection of existing authorized facilities. The Joint Parties do not believe that the first ITFS filing window in October was envisaged by the Commission as the one and only ITFS filing window (except at the private largesse of eventual BTA winners). None of the Commission's proposals in the BTA and PSA proceedings, which were aimed at fostering MMDS opportunities to provide wireless cable services competitive with

CATV offerings, contemplated any such limitations or drastic consequences to ITFS interests or the five ITFS groups of channels, which are designed fundamentally to provide distinctly different services in essential instructional and educational areas. The Commission has consistently proffered assurances that aid to MMDS and wireless carriers would not amount to a de facto reallocation of the five remaining ITFS channel groups. Consonant with the principles of equity and fairness underlying the Administrative Procedures Act, such dire results cannot and must not be either inferred or implemented by Commission silence. In the Joint Parties' view, the Commission upon reconsideration should affirmatively clarify that ITFS rights regarding both new and modified ITFS proposals will remain unimpaired by the rights accorded BTA authorization holders.

6. The Joint Parties, which either have existing excess capacity agreements with wireless carriers or propose to do so, desire to work closely with, and are sensitive to the needs of, these wireless carriers, many of whom may well become BTA holders. They do not want to harm unduly the wireless carriers and/or BTA holders in their energetic development of successful wireless cable/ITFS systems which will in turn benefit their ITFS partners.

7. However, wireless carrier interests must recognize, as the Commission has always recognized, that rules changes designed to encourage MMDS and wireless cable development should not harm ITFS interests or the continued availability of ITFS spectrum. As the Joint Parties underscored in their Petition, p. 11, and reiterate now,

in its proceedings in Gen. Docket No. 90-54, 6 FCC Rcd 6792, 6792, 6792-6793 (1991), which permitted wireless cable entities, inter alia, to use certain available ITFS channels, the Commission emphasized that it remained 'committed to not jeopardize the current or future availability of ITFS to fulfill its primary intended purpose of providing educational material for instructional use.' One of the Commission's main objectives has always been to protect long-term ITFS growth, and it has 'rejected proposals that would substantially benefit wireless cable because of their potentially negative impact on ITFS.'

8. The Joint Parties fear that some wireless cable interests, as reflected in certain Petitions and in Opposition filings in these proceedings, have lost sight of these basic principles by their endorsement of wholesale repudiation of ITFS protections whenever values of BTA areas by proposed BTA holders are perceived to be lessened. The fact of the matter is that the new BTA areas are in many instances already full of holes and significantly devalued because of preexisting authorizations or applications or because of spectrum priorities long honored by the Commission. In the words of one wireless carrier party, the potential BTA areas consist of "swiss cheese spectrum" (Pacific Telesis Enterprise Group, Opposition, p. 3). Most of the channels to be relied upon by MMDS interests and by BTA holders are within authorized ITFS bands. BTA holders, like MMDS wireline carriers before them, must take that spectrum universe as it is. Any other course of action would, as WCAI sagely observes, threaten the "potential domination of the ITFS spectrum by BTA authorization holders" (Partial Opposition, p. 12). The Joint Parties, in agreement with ITF (Opposition, p. 5), believe that in its BTA and PSA decisions herein, "the Commission did not enunciate, and . . . it did not intend, a wholesale reassignment of ITFS spectrum to commercial purposes." The Joint Parties urge

the Commission to reaffirm that the ITFS spectrum remains sacrosanct and that its full effectuation by ITFS parties, either alone or in willing partnership with wireless cable interests, is not and will not become hostage to BTA holders.

WHEREFORE, for all of the foregoing reasons and for the reasons set forth in their Petition for Reconsideration, the Joint Parties urge the Commission to modify its BTA and PSA decisions in the manner described above and in the Joint Parties' Petition for Reconsideration.

Respectfully submitted,

SCHWARTZ, WOODS & MILLER, ON
BEHALF OF ITS ITFS CLIENTS
LISTED ABOVE

By: Robert A. Woods
Robert A. Woods

By: Malcolm G. Stevenson
Malcolm G. Stevenson

SCHWARTZ, WOODS & MILLER
1350 Connecticut Avenue, N.W.
Suite 300
Washington, D.C. 20036

202-833-1700

Its Attorneys

CERTIFICATE OF SERVICE

I, Nancy Cassady, Secretary in the firm of Schwartz, Woods & Miller, certify that I have on this 25th day of September, 1995, sent by first class United States mail, copies of the foregoing CONSOLIDATED REPLY TO OPPOSITIONS TO AND COMMENTS ON PETITIONS FOR RECONSIDERATION to:

Gina Harrison, Director
Federal Regulatory Relations
Pacific Telesis Group-Washington
1275 Pennsylvania Avenue, NW
Suite 400
Washington, DC 20004

Todd D. Gray, Esquire
Dow Lohnes & Albertson, #500
1255-23rd Street, NW
Washington, DC 20037

John D. Pellegrin, Jr., Esq.
1140 Connecticut Avenue, NW
Suite 606
Washington, DC 20036

Thomas A. Pyle
Network for Instructional TV
11490 Commerce Park Drive
Suite 110
Reston, VA 22091

Thomas J. Dougherty, Esq.
Gardner Carton & Douglas
1301 K Street, NW
Suite 900 East Tower
Washington, DC 20006

Wayne Coy, Esq.
Cohn and Marks
1333 New Hampshire Avenue, NW
Suite 600
Washington, DC 20036-1573

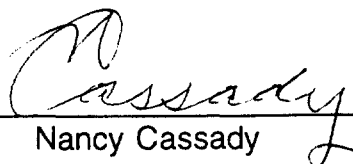
James A. Stenger, Esq.
Ross & Hardies
888-16th Street, NW
Suite 400
Washington, DC 20006

John B. Schwartz
Instructional Telecommunications
Foundation, Inc.
POB 6060
Boulder, CO 80306

William D. Wallace, Esq.
Crowell & Moring
1001 Pennsylvania Avenue, NW
Washington, DC 20004

Benjamin Perez, Esquire
1801 Columbia Road, NW
Suite 101
Washington, DC 20009

Paul J. Sinderbrand, Esq.
Sinderbrand & Alexander
888-16th Street, NW
Fifth Floor
Washington, DC 20006


Nancy Cassady